

**IN THE MATTER OF AN APPLICATION TO AN BORD PLEANÁLA FOR APPROVAL OF (I) THE N6 GALWAY CITY RING ROAD PURSUANT TO SECTION 51 OF THE ROADS ACT 1993 (AS AMENDED); (II) THE N6 GALWAY CITY RING ROAD MOTORWAY SCHEME 2018; and (III) THE N6 GALWAY CITY RING ROAD PROTECTED ROAD SCHEME 2018**

**ABP Ref. ABP-302848-18 and ABP-302885-18**

**LEGAL SUBMISSIONS OF GALWAY COUNTY COUNCIL  
RESPONDING TO LEGAL ISSUES RAISED BY  
BROOKS TIMBER AND BUILDING SUPPLIES LTD**

**Introduction**

1. Brooks Timber and Building Supplies Ltd (“Brooks”) is the occupier of premises comprising a warehouse building and yard at Parkmore Industrial Estate, Ballybrit in Folio GY62131F (the “Premises”). Brooks is in occupation of the Premises pursuant to a lease dated 14<sup>th</sup> February 2013 (the “Lease”). There is just over seven years left to run on the Lease.
2. The registered owner of the Premises is Goodbody Stockbrokers Nominees Limited and the beneficial owner is Paul McHale. The legal and beneficial owners of the Premises have withdrawn their objection to the Scheme and CPO.
3. Brooks has made a submission contending that Galway County Council (the “Council”) is not entitled to acquire its leasehold interest in the Premises.
4. As explained below, the submissions made on behalf of Brooks proceed on the basis of an erroneous factual premise erroneous and on the basis of an incorrect analysis of the provisions of the Roads Acts 1993 to 2019 (the “Roads Acts”).

## **General Principles in relation to Compulsory Acquisition**

5. A series of cases including *Crosbie v Custom House Dock Development Authority*,<sup>1</sup> *Clinton v An Bord Pleanála*<sup>2</sup> and *Reid v Industrial Development Authority*<sup>3</sup> establish that, in order for land to be compulsorily acquired, the acquiring authority must establish:
  - (a) that it is authorised by statute to acquire the land for the purpose of which it is sought to acquire it,
  - (b) that the acquisition of the land is legitimately being pursued for that purpose, and
  - (c) and the acquisition of the land is necessary for that purpose.
6. Each of these requirements will be considered in turn.

## **Authorised by Statute**

7. Section 47(1) of the Roads Acts provides that a road authority may make a motorway scheme or a protected road scheme.
8. The contents of a scheme for a proposed motorway, busway, protected road or service area are prescribed by section 47(2)(a) which provides that it shall specify, *inter alia*:
  - (i) the proposed motorway, busway, protected road or service area to which the scheme relates,
  - (ii) any land or any substratum of land which is proposed to be compulsorily acquired for the purposes of the proposed motorway, busway, protected road or services area,
  - (iii) any rights proposed to be compulsorily acquired in relation to land for the purposes of the proposed motorway, busway, protected road or service area,

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<sup>1</sup> [1996] 2 IR 531.

<sup>2</sup> [2007] IESC 19, [2007] 4 IR 701.

<sup>3</sup> [2015] IESC 82, [2016] 1 ILRM 1.

9. Accordingly, it can be seen that the test as to whether any land is properly included within a motorway scheme is whether the land is to be acquired “for the purposes of the proposed motorway”.
10. Section 47(2)(c) of the Roads Acts goes on to stipulate that:

“The land or substratum of land referred to in paragraph (a)(ii) and the rights in relation to land referred to in paragraph (a)(iii) shall include all land, substrata of land and rights in relation to land necessary for or incidental to the construction or maintenance of the motorway, a busway or a protected road and land, substrata or land or rights in relation to land required for access road, ramps, toll facilities, service areas (provided under a motorway or protected road scheme) and maintenance depots.” (emphasis added)
11. Brooks relies on this subsection to argue that land can only be compulsorily acquired if it is “necessary for or incidental to the construction or maintenance of the motorway”.
12. However, this is incorrect. Section 47(2)(c) is very clear that the land and rights that it states must be included in a motorway scheme forms part only of the land and rights referred to in section 47(2)(a)(ii) and section 47(2)(a)(iii). As such, section 47(2)(a)(ii) and section 47(2)(a)(iii) are necessarily wider in scope than section 47(2)(c).
13. Indeed, if the submission of Brooks was correct, it would have the practical effect that section 47(2)(a)(ii) would be rendered otiose and, as held by the Supreme Court in *Cork County Council v Whillock*,<sup>4</sup> it is a basic principle of statutory interpretation that a “construction which would leave without effect part of the language of a statute will normally be rejected”.
14. Therefore, the question for the Board is whether the Premises is to be acquired “for the purposes of the proposed motorway” and it is clear that it is. The acquisition is not, as asserted by Brooks, for the purposes of the replacement stables. As explained by Eileen McCarthy, the tunnel that forms part of the motorway traverses the Premises and its construction necessitates the demolition of the building currently standing on the Premises. In circumstances where it is necessary for the Premises to be acquired for the

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<sup>4</sup> [1993] 1 IR 231.

purposes of the motorway, there can be no objection where the Premises, once acquired, are then used to mitigate the impacts of the Scheme on an affected landowner.

15. Furthermore, even if Brooks was correct and the test to be applied in determining whether land could be compulsorily acquired for the purpose of the motorway scheme was that of whether it is “necessary for or incidental to the construction or maintenance of the motorway”, it is evident from the decision in *Environmental Protection Agency v Harte*<sup>5</sup> that a broad approach to the concept of ‘incidental’ is adopted. In that case, Barrett J accepted that lands “incidental” to peat extraction included “land used as access roads, for the storage of harvested peat, for sedimentation ponds or for buffer zones etc.”
16. Ms. McCarthy has explained why the acquisition of the Premises is necessary for and/or incidental to the construction of the motorway. In simple terms, this test is satisfied in circumstances where the Racecourse tunnel traverses the Premises, the tunnel cannot be constructed without demolishing, at a minimum, the majority of the building standing on the Premises, and the Premises will be fundamentally and permanently altered by the construction of the motorway.

### **The Purpose of the Acquisition**

17. It is accepted that a power of compulsory purchase can only be exercised for a legitimate purpose, i.e. for the purpose for which it is conferred.
18. It has been suggested on behalf of Brooks that the Council is seeking to acquire the Premises for an improper purpose, namely to mitigate the impact of the motorway scheme on the Racecourse and to “buy off” a potential objector. This is clearly not so.
19. As is clear from the documentation before the Board, and as confirmed by Ms. McCarthy in her evidence, the acquisition of the Premises is required for the purposes of the motorway scheme. In circumstances where the motorway traverses the Premises and it cannot be constructed without the demolition of, at a minimum, the greater part of the building standing on the Premises, there is no basis whatsoever for the suggestion that the Premises is being acquired in order to facilitate the Racecourse.

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<sup>5</sup> [2014] IEHC 308.

20. In circumstances where it is necessary to compulsorily acquire the Premises, the Council, as would be expected, has given consideration to whether it could be used to try and mitigate what is undoubtedly a significant impact on the Racecourse. Far from suggesting any improper purpose on the part of the Council, it is doing precisely what would be expected and is legally required of it, to try, so far as possible, to mitigate the impact of the Scheme on affected landowners.
21. In that regard, it is important to note that, pursuant to Article 5(1) of the EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU), there is an obligation on the part of a developer such as the Council to include in an EIAR “a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment”.
22. Therefore, there is no basis for criticising the Council for seeking to mitigate the impact of the motorway scheme on the Racecourse by using lands that it has to compulsorily acquire for the purposes of the motorway scheme to construct replacement stables.

### **Necessary for the Purpose**

23. As is clear from the evidence of Ms McCarthy, the acquisition of the Premises is necessary for the construction of the motorway scheme. While complaint is made about the change in the alignment of the scheme which had the effect that it now traverses the Premises and requires the demolition of the building standing on the Premises, the evidence of Ms McCarthy makes it clear that there were compelling environmental and economic reasons for this change in the alignment and, once it occurred, then the acquisition of the Premises became necessary if the tunnel at this location was to be constructed.
24. Brooks has submitted that the principle of proportionality has to be applied to any compulsory acquisition. The Council agrees with that proposition and this is how it has approached the acquisition of property for the purposes of the Scheme.
25. Once there was a change in the alignment of the motorway scheme such that it traversed the Premises, then the acquisition of the Premises was unavoidable. In particular, it is necessary to demolish the building on the Premises, part of the Premises is required

permanently to facilitate the realignment of Racecourse Avenue, and part of the Premises is traversed by the tunnel and cannot be built upon.

**Request for a Reference**

26. With regard to request for a referral of a question of law to the High Court pursuant to section 51 of the Planning and Development Act 2000, this would not be appropriate because the question of law identified on behalf of Brooks does not arise on the facts here.

**Jarlath Fitzsimons SC  
Declan McGrath SC  
30 October 2020**

Delivered by McCann FitzGerald, solicitors for the Council